Supreme Court, U.S.
FILED
99 643 OCT 13 1999
OFFICE OF THE CLERK

No. 99-

IN THE
Supreme Court of the United States

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

ANN CLARKE
Massachusetts Teachers Ass'n
20 Ashburton Place
Boston, MA 02108
(617) 742-7950

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20036
(202) 833-9340

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

82 pp

QUESTIONS PRESENTED

1. Whether small unions—with simple and easily understandable financial records—can meet their burden of providing adequate disclosure of the basis for the agency fee that they seek to collect from nonmembers without conducting an independent audit of those records, at a cost many times that of the agency fees at stake.

2. Whether complete forfeiture of the agency fee is an appropriate remedy for a union's failure to provide feepayers with a constitutionally adequate notice of the basis for the fee.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Proceedings Below	6
C. The Federal Question	9
REASONS FOR GRANTING THE WRIT	10
I. THIS COURT SHOULD REVIEW THE DECISION BELOW IN ORDER TO CORRECT THE MISREADING OF *HUDSON* THAT RENDERS ILLUSORY THE RIGHT OF SMALL UNIONS TO COLLECT AGENCY FEES BY IMPOSING TRANSACTION COSTS FAR IN EXCESS OF THE AMOUNT OF THE FEES AT STAKE	10
II. THIS COURT SHOULD RESOLVE THE CONFLICT IN AUTHORITY CREATED BY THE DECISION BELOW CONCERNING THE APPROPRIATE REMEDY FOR A UNION'S FAILURE TO PROVIDE A CONSTITUTIONALLY ADEQUATE NOTICE OF THE BASIS FOR ITS AGENCY FEE	21
CONCLUSION	24

TABLE OF CONTENTS—Continued

APPENDICES: Page

APPENDIX A

Opinion of the Supreme Judicial Court of Massachussetts (July 15, 1999) 1a

APPENDIX B

Decision and Order of the Massachusetts Labor Relations Commission (October 29, 1997) 14a

APPENDIX C

Massachusetts General Laws, Chapter 150E, Section 12 ..... 51a

TABLE OF AUTHORITIES

CASES Page

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ..... *passim*
Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987) 14, 15
Belhumeur v. Labor Relations Comm'n, 411 Mass. 142, 580 N.E.2d 746 (1991), *cert. denied*, 503 U.S. 1004 (1992) 8, 9, 17, 20
Browne v. Wisconsin Employment Relations Comm'n, 169 Wis. 2d 79, 485 N.W.2d 376 (1992) 16, 22
Carey v. Piphus, 435 U.S. 247 (1978) 22
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) ..... *passim*
Dashiell v. Montgomery County, 925 F.2d 750 (4th Cir. 1991) 14
Finerty v. NLRB, 113 F.3d 1288 (D.C. Cir.), *cert. denied*, 118 S. Ct. 558 (1997) 15
Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989) 19, 20, 22
Harrison v. Massachusetts Soc'y of Professors/ Faculty Staff Union, 405 Mass. 56, 537 N.E.2d 1237 (1989) 9
Hohe v. Casey, 956 F.2d 399 (3d Cir. 1992) 14, 16, 22, 23
International Ass'n of Machinists v. NLRB, 133 F.3d 1012 (7th Cir.), *cert. denied*, 119 S. Ct. 47 (1998) 17
International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) 12
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 12
Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990) 16, 22, 23
Malden Educ. Ass'n, 15 Mass. Labor Cases 1429 (Feb. 2, 1989) 4, 7, 9, 19
Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986) 22
Prescott v. County of El Dorado, 177 F.3d 1102 (9th Cir. 1999) 14, 16, 22

TABLE OF AUTHORITIES—Continued

	Page
Price v. UAW, 927 F.2d 88 (2d Cir.), *cert. denied*, 502 U.S. 905 (1991)	15
School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1980)	6, 9
Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987)	14
Wareham Education Association v. Labor Relations Commission, 439 Mass. 81, 713 N.E.2d 363 (1999)	1
Weaver v. University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993)	22, 23
CONSTITUTIONAL AND STATUTORY PROVISIONS	
U.S. Const. amend. I	2
28 U.S.C. § 1257(a)	2
Mass. Gen. L. ch. 150E, § 12	*passim*
Mass. Gen. L. ch. 211A, § 10(A)	7

IN THE

Supreme Court of the United States

No. 99-

WAREHAM EDUCATION ASSOCIATION,
BRIDGEWATER EDUCATION ASSOCIATION,
and FAIRHAVEN EDUCATORS' ASSOCIATION,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION,
DAVID DUPUIS, ELEANOR DUPUIS, BETSY ANN WOOD,
CHARLES CIPOLLINI, and PETER ANTHONY,
Respondents

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts in *Wareham Education Association v. Labor Relations Commission*, 430 Mass. 81, 713 N.E.2d 363 (1999).

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 430 Mass. 81 and at 713 N.E.2d 363, and is reproduced in the Appendix to this Petition ("App.") at 1a. The decision and order of the Massachusetts Labor Relations Commission is reported at 24 Mass. Labor Cases 23, and is reproduced in the Appendix at 14a.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on July 15, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . ."

The text of Mass. Gen. L. ch. 150E, § 12, is reproduced in the Appendix at 51a.

STATEMENT OF THE CASE

A. *Factual Background*

Petitioners Wareham Education Association ("WEA"), Bridgewater Education Association ("BEA"), and Fairhaven Educators' Association ("FEA") (collectively "Associations") are local unions that, pursuant to Massachusetts law, were recognized, respectively, as the exclusive collective bargaining representatives for the teachers employed by the School Committees of Wareham, Bridgewater, and Fairhaven, Massachusetts during the 1988-89 school year—which is the school year that is at issue in this lawsuit.[1] Although the five individual respondents were members of the bargaining units in question—and thus were represented by the Associations—they elected not to become Association members.

Massachusetts, like a number of other states, has provided by law that public-sector collective bargaining agreements may require members of the bargaining unit who decline to join the recognized union to pay an agency

---

1 With respect to respondent Betsy Ann Wood and WEA only, the 1987-88 school year also is at issue. As this detail has no bearing on the question presented here, we disregard it in this Petition.

fee to help defray the costs incurred by the union in providing representational services that benefit union members and nonmembers alike. *See* Mass. Gen. L. ch. 150E, § 12. The collective bargaining agreements in effect at all relevant times between the Associations and their respective school committees contained such provisions, and, accordingly, each of the individual respondents was required to pay an agency fee to his or her Association—a portion of which was transmitted by the Association to its state and national affiliates, the Massachusetts Teachers Association ("MTA") and the National Education Association ("NEA").[2]

As is the usual practice of unions, the agency fees requested by the Associations for the 1988-89 school year were based on their expenditures for the immediately preceding school year. Feepayers were informed of the procedure through which they could obtain a reduction in the amount of the fee, if they objected to paying the portion that supported Association activities that were not germane to collective bargaining. In order to comply with their burden under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), of ensuring that "potential objectors be given sufficient information to gauge the propriety of the union's fee," *id.* at 306, the Associations also provided feepayers with certain financial information. With respect to the portion of the agency fee that was to be passed on to their state and national affiliates, the Associations provided feepayers with a book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information." This book contained information relative to MTA's and NEA's calculation of their portions of the agency fee, including, *inter alia*, audited financial statements of those organizations for the 1987-88 school year.

---

[2] MTA and NEA are not parties to this lawsuit.

With respect to their own portion of the agency fee, the Associations did not provide audits. Several months earlier, respondent Massachusetts Labor Relations Commission ("Commission") had issued an opinion in which it stated that, as a general matter, "*Hudson* requires a public employee union to provide for the fiscal year preceding the period for which the fee is demanded a copy of an independent auditor's financial statement of revenue and expenses . . . ." *Malden Educ. Ass'n,* 15 Mass. Labor Cases 1429, 1435 (Feb. 2, 1989). In a footnote, however, the Commission elaborated as follows:

> We recognize that small unions may find the expense of an audit very burdensome. Therefore, we conclude that, in lieu of an auditor's report, a small local can satisfy that informational requirement of Section 12 by supplying to fee payers at the time of demand a sworn affidavit of a responsible union officer with personal knowledge of the accuracy of the figures upon which the union's calculation of the fee are based. An affidavit attesting to the accuracy of figures on which the union's calculation of the fee are based must be accompanied with the written assurance that the fee payer, upon request, either can obtain from the union a list of all expenditures or, at the fee payer's option, can examine the union's financial receipts and record of expenses (i.e. receipts, check stubs, etc.) at a mutually convenient time.

Id. at 1435 n.10.

All three Associations clearly were "small unions" within the meaning of the above footnote. Their 1987-88 revenues ranged from $9,400 (WEA) to $17,500 (BEA) and $29,000 (FEA).[3] WEA represented a bargaining unit of 204 employees, one of whom (respondent Wood) was a nonmember feepayer. The agency fee assessed by WEA for the school year 1988-89 was $30. There were

---

[3] These revenue figures exclude dues and fee collected by the Associations that were passed on to MTA and NEA.

116 employees in BEA's bargaining unit, including two nonmembers (respondents David and Eleanor Dupuis), who were each charged an agency fee of $30. The FEA bargaining unit included 185 employees, of whom seven (including respondents Cipollini and Anthony) were nonmembers. FEA's 1988-89 agency fee amounted to $45.

The financial records of the Associations were not complex. For example, the Commission found WEA's financial records to consist of the following:

> Ledger pages
> Approximately 40 cancelled checks, containing a one or two word description of the expenditure
> Approximately 48 check stubs
> Approximately 21 receipts or invoices
> Monthly bank statements
> Monthly treasurer's reports
> An accountant's summary of operations.

App. 23a-24a.[4] The cost to the Associations of obtaining an audit of their financial records can be estimated from the experience of several somewhat larger local associations affiliated with MTA which obtained audits in 1989. The cost of those audits ranged from $2,230.36 to $4,105.00, and the Commission found that "the cost of an audit would be the same for a union with a small income as it would be for a union with a larger income." App. 32a.

Accordingly, the Associations chose to proceed in the manner authorized by the Commission in the above-quoted footnote in *Malden Education Ass'n.* Specifically, each of the Associations provided feepayers with a six-page "Local Association Agency Fee Explanation 1988-89," which described how the Association had calculated its agency fee, explained the criteria for categorizing various types

---

[4] The Commission's descriptions of the financial records of BEA and FEA—which are similar—can be found at App. 20a-21a and 27a, respectively.

of expenditures as chargeable or nonchargeable, set forth the Association's prior-year expenditures in some 14 categories, and indicated the amounts in each category that were chargeable and nonchargeable to objecting feepayers. The Explanation concluded with a declaration signed by the Association treasurer stating, *inter alia*:

> In signing this form, I certify that the information contained herein is a true and accurate reflection of the Association's actual expenditures during the 1987-88 year to the best of my knowledge and ability. Signed under the pains and penalties of perjury.

An accompanying letter informed the feepayer that

> [i]n accordance with a decision of the Labor Relations Commission, you are entitled, upon request, either to obtain from the Local a list of all expenditures or to examine the Local's financial receipts and record of expenses at a time convenient to you and to the Local.

B. *Proceedings Below*

This litigation began in 1989 and 1990, when the five individual respondents filed charges with the Commission, alleging that they had been provided with insufficient information as to the basis of the agency fees assessed by the Associations for the 1988-89 school year, and that those fees were in excess of the amount permitted by law.[5] Following an investigation, the Commission issued substantively identical two-count complaints against each of the Associations, charging that they had violated Mass. Gen. L. ch. 150E, § 12—the state law provision authorizing agency fees—by demanding agency fees for that year without providing the feepayers with audits of their prior-year expenditures (Count I), and in excess of the amount

---

[5] The Commission is the primary forum for litigation of public-sector agency fee disputes in Massachusetts. *See School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 75-76, 431 N.E.2d 180, 184-85 (1982).

permitted by law (Count II). The Commission subsequently ordered the complaints bifurcated, and addressed Count II in separate proceedings that are not relevant to this Petition.

With regard to Count I, the Commission conducted multiple hearings and received several rounds of briefs from the parties. After seven years of proceedings, the Commission issued a Decision and Order on October 29, 1997, App. 14a, in which it sustained the complaints. Expressly disavowing its previous conclusion in *Malden Educ. Ass'n, supra,* that "small unions" could satisfy *Hudson*'s disclosure requirement without providing an audit to feepayers, App. 38a-39a; *see supra* p. 4, the Commission held that the Associations' failure to provide audits was in violation of Section 12. After reviewing the caselaw, the Commission now determined that "courts have held that verification by an independent auditor is a binding, constitutional requirement notwithstanding the potentially onerous financial implications." App. 39a. According to the Commission, these decisions reflected "the courts' reluctance to balance the competing interests of the unions and fee payors." App. 40a. Accordingly, the Commission held that "Section 12 of the Law requires unions, regardless of size, to provide an audit from an independent auditor along with their service fee demands," App. 42a, characterizing the contrary conclusion in *Malden Educ. Ass'n* as "dicta" which it "decline[d] to follow." App. 42a n.48. In its remedial order, the Commission ordered WEA, BEA, and FEA, *inter alia,* to dissolve the escrow accounts in which the individual respondents' 1988-89 agency fees had been placed, and to release those fees in their entirety to the respondents. App. 44a.

The Massachusetts Supreme Judicial Court granted petitioners' application for direct review, pursuant to Mass. Gen. L. ch. 211A, § 10(A), and on July 15, 1999, is-

sued an opinion affirming the Commission's decision in all respects. App. 1a.[6] The court recognized that the information a union provides to feepayers concerning the basis for its agency fee "is not intended to be dispositive of any dispute," but rather "is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined." App. 11a (quoting *Belhumeur v. Labor Relations Comm'n*, 411 Mass. 142, 146, 580 N.E.2d 746, 748 (1991), *cert. denied*, 503 U.S. 1004 (1992)). It further acknowledged that, for WEA, BEA, and FEA, "the cost of the audits would likely eclipse the agency fees available to the unions . . . ." App. 8a. Nonetheless, the court construed this Court's decision in *Hudson* as having established the invariable "express requirement that a union must accompany any demand for agency fees with an independently audited verification of its major expenses." App. 12a. In response to the Associations' contention that the requirement of an audit would render it impractical for them to collect agency fees, the court observed that, although Massachusets law "permits the collection of agency fees [by unions], it by no means requires them to do so." App. 9a.

The lower court also upheld the Commission's remedial order requiring the Associations to return the feepayers' agency fees in their entirety. It noted the holdings of a number of courts rejecting such a remedy for a notice violation as creating a "windfall" for the feepayers that would "deprive the unions of funds to which they are unquestionably entitled," App. 12a, but found those cases distinguishable. In this case, the court stated, the Associations were "free to renew their demands for any fees to which they

---

[6] The individual respondents—charging parties in the Commission proceedings—were permitted to intervene as appellees.

may be entitled once they comply with the requirements of [*Hudson*]." App. 13a.

C. *The Federal Question*

Both the Commission and the Massachusetts Supreme Judicial Court consistently have "construed and applied [Mass. Gen. L. ch. 150E, § 12] in a manner that avoids infringing on constitutional rights." *Malden Educ. Ass'n*, 15 Mass. Labor Cases at 1431 (citing *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 79-86, 431 N.E.2d 180, 186-90 (1982)). Accordingly, although in this case both tribunals held that the Associations' failure to provide feepayers with audits was in violation of Section 12, they based their decisions exclusively on federal constitutional law.

Observing that "a union demanding a service fee from non-members must satisfy constitutional and statutory requirements," App. 38a, the Commission articulated its inquiry in this case as interpreting the requirements of "Section 12, as limited by the First Amendment to the United States Constitution." App. 37a. The Commission rested its analysis on *Hudson*, *supra*, and looked almost exclusively to federal cases for guidance in interpreting *Hudson*'s requirements. *See* App. 37a-43a. Similarly, the court below based its holding on an exegesis of *Hudson*, and—like the Commission—relied almost entirely on federal law in conducting its analysis. *See* App. 8a-12a.[7] Neither tribunal made any attempt to support its decision on the basis of anything specific to Section 12 or any other provisions of Massachusetts law.

---

[7] The court did cite two of its earlier decisions as being "in accord" with the conclusion it reached on the basis of the federal cases, but in both cases the cited passages from those decisions merely interpreted the requirements of *Hudson*. *See* App. 11a (citing *Harrison v. Massachusetts Soc'y of Professors/Faculty Staff Union*, 405 Mass. 56, 64 n.8, 537 N.E.2d 1237 (1989); *Belhumeur*, 411 Mass. at 145, 580 N.E.2d at 747-48).

Similarly with regard to the question of remedy—which became an issue in this lawsuit only on appeal, in the wake of the Commission's remedial order—the court discussed only federal cases in deciding to affirm the Commission's order. *See* App. 12a-13a.[8]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE DECISION BELOW IN ORDER TO CORRECT THE MISREADING OF *HUDSON* THAT RENDERS ILLUSORY THE RIGHT OF SMALL UNIONS TO COLLECT AGENCY FEES BY IMPOSING TRANSACTION COSTS FAR IN EXCESS OF THE AMOUNT OF THE FEES AT STAKE

The challenged holding of the Massachusetts Supreme Judicial Court—*i.e.*, that a union cannot constitutionally collect an agency fee from nonmembers whom it represents in collective bargaining without providing an audit, regardless of the local union's size, the complexity of its financial records, and the cost of the audit in relation to the amount of the fees at stake—is exemplary of an unfortunate tendency among lower courts to read a brief line of footnote dicta from *Hudson* in a way that undermines the fundamental objective this Court consistently has pursued with respect to agency fees. Unless corrected, the decision below threatens to render illusory the right of small unions to require nonmembers to help defray the cost of representational services that benefit union members and nonmembers alike.

A. The constitutionality of agency fees in the public sector has been well established for over twenty years. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), this Court recognized the agency fee's impact on the First Amendment interests of employees who did not wish

---

[8] The Commission's order itself provided no reasoning in support of the remedies it imposed. *See* App. 44a.

to support the union that represeented them, but it nonetheless sustained the constitutionality of such fees because of "the important contribution of the union shop to the system of labor relations established by [the legislature]." *Id.* at 222.

That "system of labor relations" rests on the core principle—adopted by Congress in the private sector, and by Massachusetts and many other states in the public sector—of exclusive representation of all members of a bargaining unit by the union that commands the support of a majority of its members. The system of exclusive representation, this Court has explained, has served the United States well in promoting labor peace:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-21.

But, as this Court further explained, "[t]he designation of a union as exclusive representative carries with it great responsibilities" in negotiating and administering collective bargaining agreements and processing grievances, which "often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required." *Id.* at 221. And, "in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees . . . , union and nonunion,' within the relevant unit." *Id.* (quoting *International Ass'n of*

Machinists v. Street, 367 U.S. 740, 761 (1961)). Given these responsibilities and obligations,

> [a] union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Abood, 431 U.S. at 221-22.

While recognizing "the government's vital policy interest in labor peace and avoiding 'free riders,' " *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), as a basis for allowing agency fees, this Court also has been mindful of the First Amendment interests at stake. And, to protect those interests, it has imposed limitations on the collection and use of agency fees. Thus, a union may not charge nonmembers—over their objection—for expenditures not germane to the union's collective-bargaining activities, *see id.*, and the union must utilize certain collection procedures designed to minimize the infringement on the nonmembers' First Amendment interests. *See Hudson, supra*. In short, the law of agency fee, as it has been shaped by this Court, involves a balancing of vital interests on both sides of the equation. In an oft-repeated phrase that could stand as the guiding principle for this Court's agency fee jurisprudence, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237.

B. That objective informed this Court's decision in *Hudson, see* 475 U.S. at 302, which set forth the procedures that a union must follow in order to collect an

agency fee. In holding that the procedures followed by the Chicago Teachers Union in that case were constitutionally inadequate, this Court articulated three fundamental procedural requirements for agency fee collection. First, the union must avoid the risk that the funds of objecting nonmembers will be used, even temporarily, for purposes unrelated to collective bargaining; second, it must provide nonmembers with adequate information about the basis for the agency fee; and third, it must afford nonmembers who wish to challenge the amount of the fee the opportunity to obtain a reasonably prompt decision by an impartial decisionmaker. *Id.* at 304-09.

With regard to the second of these procedural requirements—which is the one that is at issue here—this Court noted that "potential objectors [must] be given sufficient information to gauge the propriety of the union's fee." *Id.* at 306. The *Hudson* Court found inadequate the union's disclosure in the case before it, because the union had described only those of its expenditures that went for admittedly *nonchargeable* purposes: "An acknowledgement that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%." *Id.* at 307. In an accompanying footnote, this Court noted that "absolute precision" in this regard was not required, and then made the following comment:

> The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

Id. at 307 n.18.

While the reference to an audit in this footnote clearly was dicta—it was not necessary to this Court's holding

that a disclosure identifying only the union's nonchargeable expenditures is inadequate—the principle is nonetheless now well established that, *as a general matter*, an independent audit of the expenditures on which the agency fee is based must be provided to feepayers. *See, e.g., Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 338-40 (2d Cir. 1987); *Dashiell v. Montgomery County*, 925 F.2d 750, 754-57 (4th Cir. 1991); *Hohe v. Casey*, 956 F.2d 399, 415 (3d Cir. 1992); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106-09 (9th Cir. 1999). Accordingly, the Associations' state and national affiliates—MTA and NEA—and other large unions typically include audits of their expenditures as part of the packet of financial data that they provide to feepayers. *See, e.g.*, App. 4a (audits of MTA and NEA were part of book entitled "MTA and NEA Combined Agency Service Fee Information for 1988-89 and Related Information" provided to nonmembers).

The question presented by this Petition is whether this audit requirement *invariably* applies to *all* unions, regardless of the size of the union, the complexity of its financial records, the amount of the fees at stake in relation to the cost of the audit, and the potential availability of alternative methods of providing feepayers with "sufficient information to gauge the propriety of the union's fee," *Hudson*, 475 U.S. at 306—and regardless of whether the requirement of paying for an audit would effectively negate "the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237; *Hudson*, 475 U.S. at 302.

C. The court below answered this question "yes," notwithstanding its recognition that "the cost of the audits would likely eclipse the agency fees available to the unions." The court suggested, in effect, that a small

union's recourse when confronted with audit costs vastly disproportionate to the amount of the agency fees at stake is simply to forgo collection of such fees. *See* App. 9a ("It should be noted however that, although G.L. c. 150E, § 12, permits the collection of agency fees [by unions], it by no means requires them to do so.").

Other courts have adopted the same absolutist position. For example, the Second Circuit (without having to decide the issue presented here) rejected the notion that the "[e]xcessive cost" of an audit was of any relevance, and admonished the district court that it "should not have approached this question with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests," *Andrews*, 829 F.2d at 339—even though this Court repeatedly has described the "objective" of its agency fee jurisprudence as an attempt to accommodate just such competing interests. *Abood*, 431 U.S. at 237; *Hudson*, 475 U.S. at 302.

On the other hand, a recent decision of the Ninth Circuit, while repeating some of the *Andrews* language, pointed to the possibility that smaller unions might be able to meet their *Hudson* obligations without an audit. In holding that a union's "local presumption" provided insufficient disclosure to nonmembers,[9] the court stated:

---

[9] The "local presumption" is one approach some small local unions have adopted in an attempt to preserve their ability to collect an agency fee after *Hudson*. Under this approach, nonmembers are provided with full documentation (including audits) of the local union's parent affiliates, but for purposes of the notice to fee-payers the assumption is made that the chargeable percentage of the local's expenditures is at least as high as that of the affiliates—which percentage is then used as the basis for calculating the local's fee as well. While some courts have upheld a form of local presumption, *e.g.*, *Finerty v. NLRB*, 113 F.3d 1288, 1292 (D.C. Cir.), *cert. denied*, 118 S. Ct. 558 (1997); *Price v. UAW*, 927 F.2d 88, 93-94 (2d Cir.), *cert. denied*, 502 U.S. 905 (1991); *Browne v. Wiscon-*

"We do not decide that each little unit in the [parent affiliate's] firmament must necessarily be subjected to a separate verified audit of its expenditures . . . ." *Prescott*, 177 F.3d at 1108. What was required, said the court, was "some auditor verifiable methodology which is more than a presumption." *Id.* That formulation would appear to sanction the financial disclosure provided by the Associations in this case—which did not involve any "presumption," but provided feepayers with "auditor verifiable" data about the Associations' expenditures, including "an exhaustive and detailed list of all [their] expenditures." *Hudson*, 475 U.S. at 307 n.18.[10]

The *Prescott* court added that the methodology used to provide the requisite notice to feepayers "must be utilized with an eye on the purpose of the notice in the first place, that is to allow [feepayers] a reasonable opportunity to gauge whether the money taken from them is being spent on chargeable expenses." 177 F.3d at 1108-09. While *Prescott* appears to acknowledge that this "reasonable opportunity" can, under some circumstances, be provided via something less than a formal audit, the court below insisted that nothing less would do—even if it imposed on small unions transaction costs wholly out of proportion to the amount of the agency fees at stake, thus effectively nullifying such unions' "ability to require every employee

---

son Employment Relations Comm'n, 169 Wis. 2d 79, 121-23, 485 N.W.2d 376, 393-94 (1992) (upholding modified presumption based on audit of random sample of locals), others have found it unconstitutional, particularly in the absence of any empirical data supporting the presumption. *E.g.*, *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430-32 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990); *Hohe*, 956 F.2d at 409-11; *Prescott*, 177 F.3d at 1108.

10 The court below apparently misread *Prescott*, quoting in support of its position a portion of that decision that did not address the situation of small local unions, but rather considered whether—for the parent affiliate—an accountant's "review" could take the place of a full audit. *See* App. 10a (quoting 177 F.3d at 1107-08).

to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237.[11]

The issue presented by this Petition is important not only for the three Associations directly involved, but for numerous other unions as well. In Massachusetts, for example, the vast majority of local associations affiliated with MTA are small: of MTA's 297 local affiliates in 1988-89, only 30 had annual income in excess of $25,000. App. 37a. The holding of the court below effectively renders it impossible for these small unions—and their counterparts in Massachusetts and other states—to require nonmembers to contribute their fair share to the support of representational activities that provide an indivisible service to all members of their bargaining units—and thus threatens the very objective underlying this Court's agency fee jurisprudence.

D. Although a full explication of petitioners' views as to the type of disclosure that is necessary to provide fee-payers with "sufficient information to gauge the propriety of the union's fee," *Hudson*, 475 U.S. 306, must await briefing on the merits, it may be helpful to explain the dilemma created for the Associations and other small unions by the imposition of a wholly inflexible audit requirement.

---

[11] Contrary to the view of the court below that *Hudson*'s footnote reference to "verification by an independent auditor" was intended to establish a requirement that is unvarying and inflexible, the courts are far from unanimous in requiring such rigidity. The language of footnote 18 has been described as "uncertain," *Belhumeur*, 411 Mass. at 145, 580 N.E.2d at 747; and apart from those cases that have approved a form of "local presumption," *see supra* note 9, the Seventh Circuit has recently recognized the reality that "CPAs are costly" in upholding a procedure under which local unions had their books "audited" by lay employees of their parent union. *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016-18 (7th Cir.), *cert. denied*, 119 S. Ct. 47 (1998).

The three Associations in this lawsuit all have small memberships, which during the year in question ranged from 114 to 203.[12] They had revenues that year of between $9,400 and $29,000. WEA's bargaining unit included one nonmember, from whom it stood to collect an agency fee of $30. BEA represented two nonmembers, whom it charged a $30 fee, for total potential agency fee income of $60. FEA's bargaining unit included seven nonmembers, who were assessed agency fees of $45, for a total of $315.

The record also shows that the cost to each of the Associations to conduct an audit of its financial records would have been in the range of $2,230 to $4,105. Even using the lowest of these figures, the cost of the audit would—depending on the Association—have exceeded the total amount of agency fees the Association could have collected by multiples of 7 (FEA), 37 (BEA), or 74 (WEA). If the three Associations were required to conduct audits as a prerequisite for collecting agency fees, they would in all likelihood simply be forced to forgo entirely their statutory and contractual rights to obtain a financial contribution from the nonmembers that they are legally obligated to represent. It is difficult to imagine, for example, how WEA—consistent with the fiduciary duty it owes to its members—could justify an expenditure in excess of $2,000 in order to collect a fee totaling $30.

Imposing on small unions—such as WEA, BEA, and FEA—unaffordable transaction costs wholly disproprotionate to the amount of the agency fees at stake would be particularly unfortunate in view of the potential availability to such unions of alternative means of providing

---

12 By contrast, the union involved in *Hudson* had over 26,000 members, *see* 475 U.S. at 294—some 130 times the size of the largest of the three Associations involved in this lawsuit.

feepayers with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. As noted above, the Commission had concluded—in an earlier decision that it disavowed in this case—that, in lieu of an audit, a small union could meet its burden under *Hudson* by providing to feepayers an affidavit of a union officer attesting to the accuracy of the figures upon which the union's fee was based, together with "written assurance that the feepayer, upon request, either can obtain from the union a list of all expenditures or, at the feepayer's option, can examine the union's financial receipts and record of expenses (i.e. receipts, check stubs, etc.) at a mutually convenient time." *Malden Educ. Ass'n*, 15 Mass. Labor Cases at 1435. That is the procedure the Associations used here. *See supra* pp. 5-6.

Where, as in this case, the union's financial records consist of a limited number of relatively simple documents easily understandable by feepayers, *see supra* p. 5, and where the union is of such size that it would not normally find it necessary to obtain an audit for any other operational purpose, the procedure outlined by the Commission in *Malden Educ. Ass'n* would appear to be particularly well adapted to providing feepayers with an understanding of the basis for the union's agency fee without imposing disproportionate transaction costs that would render collection of any fee impossible. Indeed, the typical feepayer, who is likely unfamiliar with the jargon of auditors, may well derive a *better* understanding of the union's expenditures from that kind of financial disclosure than he or she would from a formal auditor's report. *Cf. Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.) (suggesting that an agency fee notice "as long and complicated as an SEC prospectus" does not necessarily serve the interests of feepayers), *cert. denied*, 493 U.S. 917 (1989).

The financial disclosure provided by the Associations here would, moreover, appear to be fully consistent with the spirit of *Hudson*'s footnote 18—in which this Court suggested the requirement of an audited statement of the union's "major categories of expenses" only after noting that "[t]he Union need *not* provide nonmembers with an *exhaustive and detailed list of all its expenditures.*" 475 U.S. at 307 n.18 (emphasis added). Here, the Associations *have* provided the "exhaustive and detailed list of all [their] expenditures" that the *Hudson* footnote deemed not to be required.

In assessing whether, under circumstances where the cost of an audit is prohibitive, some other method of giving feepayers "sufficient information to gauge the propriety of the union's fee," *id.* at 306, might be adequate, it also is helpful to keep in mind the *purpose* of the audit requirement. As the court below correctly observed:

> [T]he information that the union must provide under the *Hudson* opinion is not intended to be dispositive of any dispute. That information is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined.

App. 11a (quoting *Belhumeur*, 411 Mass. at 146, 580 N.E.2d at 748). In deciding whether to challenge the amount of the agency fee, the feepayer is contemplating an act that—in contrast to many other acts undertaken in reliance on audited financial statements—is virtually cost-free and risk-free: if in doubt, the feepayer need only file his or her challenge, which costs nothing but a 33-cent stamp. *See Gilpin*, 875 F.2d at 1316 ("[M]ounting a challenge is for all practical intents and purposes free. . . .").

To insist, therefore, that a union's burden of documenting the basis for its agency fee can never be satisfied through anything less than a formal audit—even where that requirement would make collection of any fee prohibitively expensive—appears inconsistent with this Court's repeated admonition that the objective "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" *Abood*, 431 U.S. at 237; *Hudson*, 475 U.S. at 302 (emphasis added).

II. THIS COURT SHOULD RESOLVE THE CONFLICT IN AUTHORITY CREATED BY THE DECISION BELOW CONCERNING THE APPROPRIATE REMEDY FOR A UNION'S FAILURE TO PROVIDE A CONSTITUTIONALLY ADEQUATE NOTICE OF THE BASIS FOR ITS AGENCY FEE

The remedial issue presented by the decision below also is worthy of this Court's attention. Upon finding the Associations' notices to feepayers to be constitutionally inadequate because of the absence of audits, the Massachusetts Supreme Judicial Court turned to the question of remedy. The court affirmed the Commission's order requiring the Associations to return to the individual respondents the full amount of the agency fees collected from them during the year in question—which to that point had been held in an escrow account. *See* App. 12a-13a; App. 44a (Commission order).

The holding of the court below that forfeiture of the entire agency fee constitutes an appropriate remedy for a failure to provide a constitutionally adequate notice of the basis for the agency fee is contrary to the holdings of at least four federal courts of appeals and one state supreme court that have considered the issue. *See Gilpin*

v. AFSCME, 875 F.2d 1310, 1313-16 (7th Cir.), *cert. denied,* 493 U.S. 917 (1989); *Lowary v. Lexington Local Bd. of Educ.,* 903 F.2d 422, 432-33 (6th Cir.), *cert. denied,* 498 U.S. 958 (1990); *Weaver v. University of Cincinnati,* 970 F.2d 1523, 1533-34 (6th Cir. 1992), *cert. denied,* 507 U.S. 917 (1993); *Hohe v. Casey,* 956 F.2d 399, 415-16 (3d Cir. 1992); *Prescott v. County of El Dorado,* 177 F.3d 1102, 1109-10 (9th Cir. 1999); *Browne v. Wisconsin Employment Relations Comm'n,* 169 Wis. 2d 79, 130-34, 485 N.W.2d 376, 397-98 (1992).

These latter holdings are bottomed on the proposition that full restitution of the agency fees—much or all of which is properly chargeable to feepayers—would amount to a punitive remedy of the kind that, absent willful or malicious constitutional violations, this Court has rejected as an inappropriate remedy in civil rights cases. *Carey v. Piphus,* 435 U.S. 247 (1978); *Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299 (1986). As the Seventh and Ninth Circuits have observed:

> The union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things . . . . The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law . . . .

Prescott, 177 F.3d at 1109 (quoting *Gilpin,* 875 F.2d at 1316). Accordingly, these courts have found the proper remedies for failure to provide adequate notice (including the lack of an audit) to include injunctions against further collection of agency fees until such notice is pro-

vided, *e.g.*, *Weaver*, 970 F.2d at 1534, and nominal damages, *e.g.*, *Hohe*, 956 F.2d at 415-16.

The court below purported to distinguish several of these cases by asserting, without citation, that there the issue had been whether the unions could *ever* recover the agency fees in question, App. 13a, while in the case before it the court read the Commission's order as allowing the Associations to renew their demands for the 1988-89 agency fees "once they comply with the requirements of [*Hudson*]," App. 13a—presumably by furnishing audits for 1987-88. But this is a distinction without a meaningful difference. As a practical matter, it is questionable whether audits of the Associations' expenditures during the 1987-88 school year could be prepared at this point. But even if the Associations were able to prepare audits so long after the events in question, once refunds have been made to the individual respondents from the escrow accounts, it is to say the least doubtful whether those funds could be recouped.[13]

In sum, the remedy ordered by the Commission and affirmed by the Massachusetts Supreme Judicial Court "depriv[es] the Union of access to some . . . funds that it is unquestionably entitled to retain." *Lowary*, 903 F.2d at 433 (quoting *Hudson*, 475 U.S. at 310). Despite the attempt of the lower court to distinguish the cases cited above, the fact is that the courts in those cases have concluded that this is not a proper remedy for a union's failure to comply with *Hudson*'s disclosure requirement.

---

[13] The record does not disclose whether the individual respondents remain employed in the same school districts and, if so, whether those districts' collective bargaining agreements still contain agency fee provisions. Unless both of these conditions are met, it is difficult to see what means would be available to the Associations at this point to collect their 1988-89 agency fees.

This Court should grant certiorari in order to resolve this conflict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ANN CLARKE
Massachusetts Teachers Ass'n
20 Ashburton Place
Boston, MA 02108
(617) 742-7950

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20036
(202) 833-9340

Attorneys for Petitioners